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8                   UNITED STATES DISTRICT COURT  
9                   SOUTHERN DISTRICT OF CALIFORNIA

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11 PHILADELPHIA INDEMNITY  
12 INSURANCE COMPANY, a  
13 Pennsylvania corporation,

14                   Plaintiff,

15               v.

16 GOTHAM MANAGEMENT, LLC, a  
17 New York corporation; and DOES 1  
through 10,

18                   Defendant.

19                   GOTHAM MANAGEMENT, LLC, a  
20 New York corporation,

21                   Counterclaimant,

22               v.

23 PHILADELPHIA INDEMNITY  
24 INSURANCE COMPANY, a  
Pennsylvania corporation,

25                   Counterdefendant.

26                   Case No.: 16cv673 NLS (JMA)

27                   **ORDER:**

28                   **(1) GRANTING PHILADELPHIA  
INDEMNITY INSURANCE  
COMPANY'S MOTION TO  
COMPEL LOSS OF REVENUE  
RECORDS, FINANCIAL RECORDS,  
AND RECORDS DEMONSTRATING  
COSTS INCURRED TO DATE; and**

**(2) EXTENDING CERTAIN  
SCHEDULING ORDER  
DEADLINES.**

**[Dkt. No. 35]**

1        **Relevant Background.**

2           Plaintiff Philadelphia Indemnity Insurance Company (Philadelphia) filed this  
3 declaratory relief action regarding an insurance claim. Philadelphia provided a  
4 “Commercial Lines” policy for defendant insured Gotham Management, LLC, doing  
5 business as the Keating Hotel (Gotham). Compl. ¶¶ 5-6. In the underlying insurance  
6 claim, Gotham suffered extensive water damage due to an intoxicated guest passing out  
7 in the shower and allowing water to eventually overflow into several rooms at the hotel.  
8 Compl. ¶ 7. In response to this declaratory relief action, Gotham filed a bad faith  
9 insurance counterclaim.

10          On March 30, 2014—the same day as the suffered water loss—Gotham submitted  
11 a claim to Philadelphia for the loss. Compl. ¶ 8. Gotham believes that by April 23, 2014,  
12 Philadelphia’s independent adjuster estimated the loss to be worth \$480,000, even though  
13 its adjuster communicated to Gotham that the loss was valued at only \$250,000. Losh  
14 Decl. ¶ 5.<sup>1</sup> Philadelphia sent Gotham a check for \$100,000 on May 27, 2014. Losh Decl.  
15 ¶ 5. As the parties could not agree on the amount of the loss, they submitted the matter  
16 for an appraisal. Compl. ¶ 10. The first partial appraisal award was issued on June 17,  
17 2015, approximately 15 months after the loss. Compl. ¶ 11. This first appraisal  
18 determined values for the building repairs and business personal property, as well as the  
19 lost business income and sustained extra expense damages. Miglietta Decl. ¶ 4. It left  
20 open for future evaluation the value of the following items: the hallway carpets; the point  
21 of sale unit; the telephone systems; and the alarm, sound and lighting systems in the hotel  
22 bar. Compl. ¶ 11; Losh Decl. ¶ 9.

23          A second appraisal award issued on October 19, 2015 and covered the alarm  
24 system, and the sound and lighting systems in the night club or lounge area. Miglietta  
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27       <sup>1</sup> Philadelphia filed an objection to this paragraph of the declaration. The court does not  
28 rely on this evidence but refers to it to provide context to the dispute.

1 Decl. ¶ 5. Philadelphia ultimately paid the Gotham \$547,834.98 for the water loss.

2 Miglietta Decl. ¶ 6.

3 By filing this declaratory relief action Philadelphia asks the court to declare that it  
4 owes no extra-contractual damages. In the bad faith counterclaim, Gotham seeks these  
5 extra-contractual damages:

- 6 • \$323,000 in lost revenue for the basement nightclub bar and restaurant.
- 7 • \$200,000 in lost revenue for the hotel due to inability to host special events.
- 8 • \$93,000 in depreciation holdback.
- 9 • \$260,000 in lost revenue for the hotel for 19 months.
- 10 • \$19,000 for extra laundry expense.
- 11 • \$45,000 for phone replacement system.
- 12 • \$80,000 in appraisal, attorney and public adjusting fees.

14 Counterclaim ¶ 30.

15 Philadelphia served document requests and noticed the deposition of Edward Kaen,  
16 owner of Gotham and manager of the Keating hotel. In the document requests and  
17 deposition notice they asked for Gotham's financial statements that would show support  
18 for its extra-contractual damages claims. Miglietta Decl. ¶ 11. Mr. Kaen appeared for  
19 his deposition but did not produce any documents. Miglietta Decl. ¶ 13. During the  
20 deposition he refused to answer questions regarding the possible tenants and future plans  
21 for the basement area. Miglietta Decl. ¶¶ 13-14; Ex. H.

22 After a meet and confer and production of supplemental Rule 26 disclosures and  
23 responses to the discovery, Gotham did not produce documents to support its claims of  
24 extra-contractual damages. Miglietta Decl. ¶ 16. On April 13, 2017, Philadelphia sent  
25 Gotham its draft of a joint discovery motion on this issue and asked Gotham to provide  
26 its insert. Gotham never responded regarding the joint motion, in violation of this  
27 chambers' rules. Philadelphia was then required to file a fully noticed motion with a 28-  
28 day briefing schedule.

1        By way of this motion Philadelphia seeks to compel the production of all  
2 documents relating to the revenue of the basement and lounge area and its tenants; related  
3 financial documents such as cash flow statements, bank deposits, receipts, invoices,  
4 registers, tax records, balance sheets, and statements; documents reflecting profitability  
5 for fiscal years 2013-2015 and costs of repairs; and a continued deposition of Mr. Kaen.

6 **Legal Standard.**

7        Parties can obtain discovery of non-privileged information so long as it

8              is relevant to any party's claim or defense and proportional to  
9              the needs of the case, considering the importance of the issues  
10             at stake in the action, the amount in controversy, the parties'  
11             relative access to relevant information, the parties' resources,  
12             the importance of the discovery in resolving the issues, and  
            whether the burden or expense of the proposed discovery  
            outweighs its likely benefit.

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14 Fed. R. Civ. P. 26(b)(1). Discoverable information need not be admissible. *Id.* Once the  
15 propounding party establishes that the request seeks relevant information, “[t]he party  
16 who resists discovery has the burden to show discovery should not be allowed, and has  
17 the burden of clarifying, explaining, and supporting its objections.” *Superior Commc'nns*  
18 *v. Earhugger, Inc.*, 257 F.R.D. 215, 217 (C.D.Cal.2009); *see Blankenship v. Hearst*  
19 *Corp.*, 519 F.2d 418, 429 (9th Cir.1975) (requiring defendants “to carry heavy burden of  
20 showing why discovery was denied”).

21 **Discussion.**

22        The basis for Gotham's extra-contractual damages bad faith counterclaim is  
23 Philadelphia's alleged delay in payment and undervaluing of the loss. Counterclaim ¶¶  
24 14-15, 36-50. Gotham objects to financial discovery regarding its extra-contractual  
25 damages and says that Philadelphia already has this information from the appraisal  
26 awards. It argues that the damage values for bad faith were already determined by the  
27 appraisers in the underlying contractual award, and the parties are now bound to those  
28 numbers. Losh Decl. ¶ 14. Those numbers include \$17,000.00 monthly loss in rental

1 income from the basement nightclub bar and restaurant; \$13,697.89 monthly loss in hotel  
2 revenue; and \$1,000.00 monthly loss in laundry costs. Losh Decl. ¶ 8. It seeks these  
3 monthly values for the 19-month period running from the date of loss (March 31, 2014)  
4 through the payment of the second appraisal award (October 21, 2015). Losh Decl. ¶ 13.  
5 Gotham further argues that because these items were decided in an appraisal, and an  
6 appraisal regarding an insurance policy is a form of arbitration, the appraisal award is not  
7 subject to judicial review. Opp'n, p.10 (citations omitted).

8 Philadelphia counters that the appraisal award for the insurance contract did not set  
9 the rate for any extra-contractual damages. It also argues that Gotham may not be able to  
10 prove proximate causation between the water loss and its claimed loss of revenue of the  
11 basement lounge area for the 19 months because the basement lounge area has remained  
12 unoccupied for nearly two years after payments were made. Reply, p.3.

13 Bath faith is not covered under the original insurance contract but rather is a  
14 separate tort claim:

15 "The law implies in every contract, including insurance  
16 policies, a covenant of good faith and fair dealing. ... To fulfill  
17 its implied obligation, an insurer must give at least as much  
18 consideration to the interests of the insured as it gives to its own  
19 interests. When the insurer unreasonably and in bad faith  
withholds payment of the claim of its insured, it is subject to  
liability in tort."

20  
21 *Wilson v. 21<sup>st</sup> Century Ins. Co.*, 42 Cal.4th 713, 720 (2007). In the bad faith counterclaim  
22 Gotham seeks "special, general and consequential damages" that were caused by the  
23 "proximate and legal result of the aforementioned wrongful conduct of Philadelphia."  
24 Compl. ¶ 49.

25 In its bad faith claim Gotham must show that the alleged undervaluing and delayed  
26 payment by Philadelphia proximately caused it to lose out on monthly rental income.  
27 Philadelphia has a right to conduct discovery on Gotham's extra-contractual damages and  
28 proximate causation, as this information is relevant to Gotham's bad faith claim and

1 Philadelphia's defenses to it, and is proportional to the needs of the case. Further,  
2 Gotham should have relatively easy access to this information and it should not be  
3 burdensome to produce.

4       Gotham is still free to argue on the merits that the values from the appraisals  
5 should apply to this case. But the court denies Gotham's objections to the requested  
6 financial discovery as to extra-contractual damages because it fails to carry its "heavy  
7 burden" to show why the discovery should be denied under Rule 26(b)(1). *See*  
8 *Blankenship*, 519 F.2d at 429.

9 **Order.**

10       For good cause shown, the court **ORDERS** that Gotham produce to Philadelphia,  
11 by June 5, 2017, all of the following documents:

12       1. All documents tracking and reflecting its receipt and expenditure of each of  
13 the payments comprising the \$547,834.98 amount previously paid by Philadelphia to  
14 Gotham, including documents reflecting receipt and deposit of each payment by  
15 Philadelphia, and all documents reflecting expenditures of such payments including  
16 invoices, receipts, cancelled checks, credit card statements, and registers.

17       2. All documents supporting Gotham's claim for the withheld depreciation,  
18 including documents reflecting costs incurred to date by Gotham for repairs to the  
19 Keating Hotel as a result of the subject water loss, including invoices, receipts, cancelled  
20 checks, credit card statements and registers.

21       3. All records supporting Gotham's loss of revenue claim due to the water  
22 damage to the Keating Hotel guest rooms including the occupancy records of the various  
23 rooms from January 1, 2013 to the present.

24       4. All records supporting Gotham's loss of revenue due to the water damage to  
25 the lounge/basement area including documents reflecting revenue derived from the lease  
26 of the lounge basement area from January 1, 2010 to the date of loss or March 30, 2014,  
27 all lease agreements from January 1, 2010 to the present, all documents reflecting  
28 attempts to lease the lounge/basement area, including emails, memoranda of

1 understanding, or other communications from the date of loss to the present.

2       5. All records supporting Gotham's loss of revenue due to the water damage to  
3 Café 21 including all documents reflecting revenue derived from the lease of the  
4 restaurant area and portions of the basement provided for Café 21's use from the date of  
5 loss or March 30, 2014 to the present, including all agreements relating to the lease of  
6 such restaurant premises, concessions provided, lease payments, lease payment receipts,  
7 and lease payment deposits.

8       6. Gotham must produce all documents, including cancelled checks, wire  
9 transfer withdrawal slips, and registers supporting its claim for attorney's fees, public  
10 adjuster fees, and appraiser fees.

11       7. Any and all financial records for the fiscal years of 2013-2015 consisting of  
12 the following: quarterly and yearend balance sheets, income statements, cash flow  
13 statements, bank statements, bank deposits, receipts, invoices, registers, and tax records.

14           In light of the foregoing, the court **FURTHER ORDERS**:

15       8. Philadelphia must amend its expert disclosures in light of Gotham's  
16 additional document production by June 26, 2017.

17       9. If Philadelphia seeks a continued deposition of Mr. Kaen regarding the  
18 forthcoming documents, they must conduct that deposition by June 26, 2017.

19       10. All expert discovery must be completed by all parties by July 17, 2017. The  
20 parties must comply with the same procedures set forth in the paragraph governing fact  
21 discovery.

22       11. All other pretrial motions including those addressing Daubert issues must be  
23 filed by August 3, 2017.

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1       12. All non-conflicting provisions in the court's July 29, 2016 and April 4, 2017  
2 Scheduling Orders remain in effect.

3       **IT IS SO ORDERED.**

4 Dated: May 23, 2017



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6       Hon. Nita L. Stormes  
7       United States Magistrate Judge

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